BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

GUADALUPE AVILA	)	
Claimant	)	
	)	
VS.	)	
	)	
BLAZING STAR STAFFING	)	
Respondent	)	Docket No. 1,051,289
	)	
AND	)	
	)	
AMERICA FIRST INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent requests review of the August 6, 2010 preliminary hearing Order entered by Administrative Law Judge Marcia Yates Roberts (ALJ).

ISSUES

The ALJ found that the claimant met her burden of proving that she sustained an injury on or about March 24, 2010 while working for respondent and is entitled to the relief she requested. The ALJ went on to assign Dr. Pratt as claimant's authorized treating physician for claimant's right elbow injury.

The respondent requests review of this decision and alleges three points of error. Respondent maintains that claimant's evidence failed to establish either that she sustained personal injury by accident on March 24, 2010 or that her alleged injury arose out of and in the course of her employment with respondent. Lastly, respondent argues that the ALJ erred in implicitly concluding that claimant provided timely notice of her alleged claim as required by K.S.A. 44-520.[1] Accordingly, respondent contends the preliminary hearing Order should be reversed and claimant's request for benefits should be denied.

[1] The ALJ's Order is silent on the issue of notice although the issue was very clearly presented at the preliminary hearing. Given the fact that she awarded claimant the requested benefits, she implicitly concluded that claimant provided timely notice of her claim as required by the statute.

Claimant argues that the ALJ should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

Claimant[2] was employed by respondent as a housekeeper and was assigned to work at the Embassy Suites. This is essentially the only fact the parties can agree upon.

Claimant alleges she injured her elbow while cleaning a bathroom. She maintains the door to the bathroom unexpectedly shut and struck her right elbow.[3] She continued working that day but says she told two co-workers (Jenny and Sandra) and a supervisor (Isabel) of the accident.[4] Claimant also says she told an on-site supervisor Ernesto (who was not employed by respondent) of the injury and that she was referred to her site supervisor, Salvador Cervantes.[5]

Claimant continued to work but testified that Isabel, her supervisor, massaged her arm three times a week. She would work as she could, but conceded that she missed days due to her injury and the resulting pain.

On April 1, 2010, claimant testified that Salvador Cervantes contacted her about her injury. Claimant believes he was told of the injury by Ernesto. That contact prompted cell phone calls between claimant and Mr. Cervantes. These calls are purportedly evidenced by a call registry produced by claimant. And while the registry reflects calls billed to claimant's cell phone number, and Mr. Cervantes' phone number is reflected on this registry for calls on April 1 and 2, 2010, not much else can be gleaned from this record. In fact, it is difficult to know if claimant was making or receiving the calls involving Mr. Cervantes' telephone number. The longest call took 1 minute 52 seconds and the record is silent on the precise content of these conversations. Interestingly, claimant does not recall whether she had occasion to call Mr. Cervantes on any other work-related issues at any other time other than April 1 and 2, 2010.

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[2] Apparently claimant's name is Guadalupe Avila, but the name she used for purposes of her employment with this respondent is Zaida Reyes.

[3] P.H. Trans. at 7.

[4] *Id.* at 8.

[5] *Id.* at 11.

Claimant says Mr. Cervantes told her he would get back to her about the injury and when he did, on April 2, 2010, he told her too much time had passed and she would have to obtain any treatment on her own.

Thereafter, claimant sought treatment with a chiropractor on April 5, 2010. These records indicate claimant suffered an "incident" 4 days before the office visit rather than March 24, 2010, as claimant has testified. At the preliminary hearing claimant said she must have been mistaken while talking to the doctor.[6] There are also musings in these medical records (some of which are in Spanish and were loosely translated at the preliminary hearing) that claimant's mechanism of injury was from "when I was in the bath *tub*" rather than in the bathroom.[7] Again, claimant says maybe she was mistaken.[8]

Mr. Cervantes also testified at the preliminary hearing. According to him, claimant did not work on March 24, 2010. In fact, this contention is borne out by the documentation he presented at the preliminary hearing. The entire work week is reflected on this schedule and shows that claimant worked a total of 34 hours from March 19 to March 25, 2010. In fact, claimant did not work either Wednesday March 24, 2010 or Thursday, March 25, 2010. It is unknown whether claimant was working on any of the other relevant days as those records are not included within the evidence presented to the ALJ. It does appear, however, that neither Jenny or Sandra, claimant's co-workers, are listed on this sheet.[9]

Mr. Cervantes went on to testify that his first notification of claimant's alleged injury came on Saturday, April 10, 2010. He testified that Ernesto, the on-site supervisor called him and "said it was her."[10] Mr. Cervantes went to the hotel that same day, Saturday, and spoke to claimant. He informed her that he would have to talk to his superior, Miguel, and get back to her.

In the meantime, claimant continued to work her normal work duties until another issue emerged, involving $100 in cash that claimant had failed to report. According to Mr. Cervantes the money was missing, had been found by claimant and she failed to report it. He testified that "[w]e both decided not to be working there anymore because she wouldn't feel comfortable working and they don't feel comfortable working with her, so we

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[6] *Id.* at 18.

[7] *Id.*

[8] *Id.*

[9] It is certainly possible that Jenny and Sandra are also working under aliases, or they are employed by other entities. This record does not shed any light on this aspect of the facts.

[10] P.H. Trans. at 30.

both decided."[11] In contrast, claimant says she understood she was fired, but did not understand that her termination had anything to do with the unreported $100.[12]

The ALJ considered the evidence and concluded -

> The court finds that claimant had met her burden of proof that she sustained an injury on or about March 24, 2010 while working for respondent and is entitled to the requested relief. Therefore, Dr. Pratt is designated as the authorized physician to evaluate and treat claimant's right elbow injury.[13]

K.S.A. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." K.S.A. 44-508(g) finds burden of proof as follows: "Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record." The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[14]

With all due respect to the ALJ and her unique ability to observe the two witnesses who appeared before her, this Board Member finds that claimant has failed to meet her evidentiary burdens in this matter and as a result, the Order granting claimant's request for benefits should be reversed.

As noted above, it is claimant's burden to establish that she has a compensable claim. First and foremost, claimant has failed to credibly explain why the employer's records show she was not working on the day that she adamantly asserts she was injured. Similarly, those same records fail to show claimant's co-workers were working that day. Second, the chiropractor's notes do not support her contention that she was injured on March 24, 2010 while at work cleaning in a bathroom. Rather, that physician's notes indicate claimant was injured on April 1, 2010 with some reference to a bathtub. This may or may not be due to the language barrier, although the medical records themselves are in Spanish, claimant's native language.

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[11] *Id.* at 32.

[12] *Id.* at 26.

[13] ALJ Order (Aug. 6, 2010).

[14] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

That is not to say that respondent's witness, Mr. Cervantes, is without credibility challenges. Mr. Cervantes initially denied speaking to claimant on the phone on April 1 or 2, but ultimately remembered doing so. He also seemed to have some difficulty articulating the company's policy on providing medical treatment when employees were injured and even more difficulty consistently remembering the circumstances surrounding claimant's termination.

In sum, neither of these witnesses come across as particularly credible, but it is claimant's burden to establish the necessary elements of her claim. Based upon this record, this member of the Board is unpersuaded that claimant sustained an accidental injury arising out of and in the course of her employment on March 24, 2010. The ALJ's preliminary hearing Order is, therefore, reversed. In light of this finding, the remaining issue of timely notice, under K.S.A.44-520 is moot.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.[15] Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2009 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Marcia Yates Roberts dated August 6, 2010, is reversed.

IT IS SO ORDERED.

Dated this _____ day of October 2010.

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JULIE A.N. SAMPLE
BOARD MEMBER

c: C. Albert Herdoiza, Attorney for Claimant
Meredith L. Moser, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge

[15] K.S.A. 44-534a.